UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH NELSON SPENCER, JR., Defendant.	No. CR03-4134-DEO **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

TABLE OF CONTENTS

I. INTRODUCTION

This matter is before the court on the defendant's motion (Doc. No. 33) to suppress evidence obtained during the execution of a search warrant at the defendant's residence on or about June 16, 2000. The defendant filed the motion on July 6, 2004, which was 25 days after the deadline for the filing of pretrial motions in this case. (*See* Doc. No. 27, extending pretrial motions deadline to June 11, 2004) Defense counsel argues the motion should be allowed because counsel was not appointed to represent the defendant until

June 14, 2004, which was after the pretrial motions deadline had passed. In the interests of justice, the court will consider the motion timely filed.

After receiving an extension of time from the court, the plaintiff (the "Government") resisted the motion on July 16, 2004 (Doc. No. 45). The court held a hearing on the motion on July 26, 2004 (the "first hearing"), at which the defendant Joseph Nelson Spencer, Jr. ("Spencer") was present in person with his attorney, Pamela A. Wingert, and United States Attorney Kevin C. Fletcher appeared on behalf of the Government. At the first hearing, the Government offered the testimony of Monona County Sheriff's Deputy Roger Krohn, and Monona County Magistrate Gary Taylor. The following exhibits were admitted into evidence at the first hearing: Gov't Ex. 1, copy of Application for Search Warrant dated June 15, 2000, consisting of ten pages[1]; Gov't Ex. 2, copies of additional information submitted to Magistrate Taylor with the warrant application, consisting of five pages; Gov't Ex. 3, Return to Search Warrant dated June 17, 2000, consisting of fourteen pages; and Gov't Ex. 4, statement of Butch Lahr, also presented to Magistrate Taylor with the warrant application, consisting of one page.

Subsequent to the first hearing, and with leave of court, the Government filed a supplemental brief in support of its resistance on July 27, 2004 (Doc. No. 57), and Spencer filed a supplemental brief in support of his motion on July 28, 2004 (Doc. No. 58). Attached to the Government's supplemental brief are Gov't Ex. 5, which the Government describes as "a copy of the file stamped original application for search warrant, search warrant, attachment A, attachment B, attachment D and return of search warrant filed June 19, 2000" (Doc. No. 57, p. 1); and Gov't Ex. 6, which the Government

[1]Copies of pages 1-5 and 7-10 of Gov't Ex. 1 also were attached as Defendant's Ex. 1 to Spencer's motion to suppress. Page 6, which was not attached to Spencer's motion, is a blank form for the return to the warrant.

describes as "a copy of the Monona County Accessor's's's [sic] Office file which is a two-sheeted document that matches the one contained in the search warrant." (*Id.*)

The court held a supplemental hearing on August 5, 2004 (the "second hearing"). Spencer and Ms. Wingert again were present, and Mr. Fletcher was present on behalf of the Government. The Government offered the testimony of Iowa State Trooper Dana Tews, Special Agents Christopher Lee Leighter and Todd G. Jones of the Iowa Division of Narcotics Enforcement ("DNE"), and further testimony of Deputy Krohn. The court admitted into evidence a certified copy of Gov't Ex. 5, the complete warrant application, search warrant, and return from the files of the Monona County District Court Clerk, consisting of twenty-five pages.

The court now finds the motion to be fully submitted.

II. AUTHENTICITY OF GOVERNMENT EXHIBITS 5 & 6

Before addressing the merits of Spencer's motion, the court will consider Spencer's objection to Gov't Exs. 5 and 6, which were attached to the Government's supplemental brief. (*See* Doc. No. 58) During the first hearing, the court raised *sua sponte* the issue of whether the copies of the search warrant contained in Gov't Ex. 1, and attached as an exhibit to Spencer's motion, were complete.[2] Specifically, the court noted that neither copy of the warrant identified the address of any premises to be searched.

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[2]Federal Rule of Criminal Procedure 52 provides, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The court finds a defect appearing on the face of a warrant constitutes the type of plain error that affects a defendant's substantial rights. *See generally United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). A constitutional deprivation of this magnitude affects the very framework of criminal proceedings, and no trial, conviction, or punishment that arises from such a constitutional deprivation may be regarded as fundamentally fair. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1264-65, 113 L. Ed. 2d 302 (1991).

In *Groh v. Ramirez*, ___ U.S. ___, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004), the Supreme Court held a warrant that did not describe, with particularity, the specific items to be seized was in violation of the Fourth Amendment, which the Court noted "states unambiguously that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized*.'" *Groh*, 124 S. Ct. at 1289 (quoting U.S. Const. amend. IV; emphasis by the Court). Based on the Court's analysis in *Groh*, a similar result would apply to a warrant that fails to describe with particularity the *place* to be searched.

The warrant in question lists the following under "Property or Persons to be Searched":

> DEFENDANT: JOSEPH NELSON SPENCER JR. 7/16/43
> SSN: [omitted] WHITE MALE, 506 [sic] 140
> BLACK HAIR, HAZEL EYES
>
> ANY VEHICLES ON SAID PROPERTY
>
> SEE ATTACHMENT "D"

(Gov't Ex. 1, p. 2) As portrayed in Gov't Ex. 1 and the attachment to Spencer's motion, Attachment D, to which the warrant refers, consists of two pages. The first page contains certain valuation and square footage information about an unspecified parcel of real estate, including a sketch that appears to show square footage in various rooms of a building. The second page contains a photograph of an unspecified residence, and bears the date 6/19/96.

Deputy Krohn and Magistrate Taylor both testified they believed the copies of the warrant submitted to the court by the parties were incomplete. They testified Attachment D is the "property card" from the Monona County Assessor's office, and the back side of the card, which includes the physical address of the property, had been omitted from the parties' copies.

The court held open the record to allow the Government to obtain a certified copy of the actual search warrant on file with the Monona County Court Clerk. In the alternative, the court held the parties could agree that a certified copy was unnecessary. When the Government filed its supplemental brief, it attached Gov't Ex. 5, purporting to be a full and complete copy of the warrant application, search warrant, and return from the Monona County District Court Clerk's file; and Gov't Ex. 6, a copy of the front and back of the Monona County Assessor's property card for Spencer's residence. Spencer objected to the documents' authenticity, noting the documents are not certified, and the Government had not contacted Spencer's counsel to discuss any stipulation regarding the documents' authenticity.

At the second hearing, the Government offered a certified copy of Gov't Ex. 5, which was admitted into evidence without objection from Spencer. Gov't Ex. 6 was neither offered nor admitted into evidence.

The court now turns to consideration of the merits of Spencer's motion to suppress.

III. FACTUAL BACKGROUND

On or about June 16, 2000, a UPS driver contacted law enforcement officers in Crawford County regarding a delivery he had made to 40324 220th Street in rural Monona County. The driver stated he had delivered four liters of the chemical methanol to the address. While he was making the delivery, the driver noticed a strange odor, and he saw glass tubing, a hot plate, a yellowish liquid in a large beaker, and other items.

Because the delivery address was in Monona County[3], Crawford County officers relayed this information to Deputy Krohn of the Monona County Sheriff's office. Deputy Krohn received a typewritten statement signed by Butch Lahr, a UPS driver, in which Mr. Lahr stated as follows:

> I, Butch Lahr, a delivery driver for United Parcel Service, on June 14, 2000 delivered a package with a hazardous sticker on it to 40324 220th St in Ute Iowa. The package contained 4 liters of Methanol. I was unsure that the house was occupied so I knocked twice on the door with no response. At that time I opened the porch door and hollered UPS.
>
> At that time I set the box inside the porch and smelled an order [sic] that I wasn't familiar with. The order [sic] was of something being burnt or cooked and was a fowl [sic], unfamiliar smell. At that time to my right I observed a double hot plate, a large glass beaker, several smaller beakers and numerous glass, or plastic tubing running to them. There was a yellowish colored liquid inside the large beaker.
>
> I shut the door and got halfway to the truck and a guy comes out of the house with his stocking feet in the rain. He asked me what I wanted. I replied this is the Joe Spencer place and he replied "Yes". The person I saw had long dark hair and a beard and was approx. 175# and 5'10"[.]
>
> At that time I left the property and later on that night did contact deputy Mike Bremser, and told him of observations I had seen during my delivery.

(Gov't Ex. 4)

Deputy Krohn took several actions to corroborate the informant's statement. He obtained a copy of a UPS shipping label showing the shipment of four liters of methanol

[3]Various documents list the address as being in Ute, Iowa, and Soldier, Iowa. Deputy Krohn testified the address is actually in rural Monona County, with Ute and Soldier being the closest towns to the physical location of the property.

to Joe Spencer, 40324 220th, Ute. (Gov't Ex. 2, p. 5) He obtained copies of two documents from Tri-Ess Sciences, Inc.: (1) a Prepaid Invoice dated June 8, 2000, showing the sale of a glass beaker and one gallon of "Methyl Alcohol (99.5%) Anhydrous" to Joseph Spencer at 40324 220th Street, Soldier, Iowa; and (2) a Credit Card Sales Receipt dated May 18, 2000, showing the sale of Ferrous Sulfate, Calcium Phosphate (Mono), Phosphoric Acid (75% Ortho), and Sulfuric Acid (95%-98%) to Joseph Spencer, 40324 220th Street, Soldier, Iowa. (Gov't Ex. 2, pp. 2 & 3). A representative of Tri-Ess also faxed to Deputy Krohn an informational paragraph regarding the chemical makeup and uses for methanol. (Gov't Ex. 2, p. 4) In a handwritten note accompanying the documents, the Tri-Ess representative noted, "Illicit use of methanol is for a procedure known as "Free Basing" in conjunction with acetone." (Gov't Ex. 2, p. 1)

Based on this information, Deputy Krohn completed an application for a search warrant. Deputy Krohn testified this was the first warrant application he had completed on his own since he had been certified as a clandestine laboratory investigator a few weeks earlier. In the warrant application, under "Property or Persons to be Searched," Deputy Krohn entered "See Attachment D." (Gov't Ex. 1, p. 1)

On Attachment A to the application, he noted he had been a Deputy Sheriff for twelve years, and he had been assigned to Patrol for eight years. He further noted the information supporting the application was from his own investigation and the statement of a witness. He then set forth the following in support of the application:

> MONONA COUNTY SHERIFF'S OFFICE CASE NUMBER: 2000670
>
> On 6/14/00 at 2050 hours, I was contacted by Crawford County Deputy Mike Bremser in reference to information he was given about the presence of a possible clandestine drug lab located at 40324 220th street in rural Monona County. Acording [sic] to information given to Deputy Bremser, the witness delivered four litres of a chemical known as "methanol" to the

> defendant[']s address. While he was at the residence he noticed a strong unfamiliar foul odor. He also saw a hot plate setup[,] glass beakers, and numerous amounts of glassware and tubing. A yellowish liquid in a large beaker was also seen.

(Gov't Ex. 1, p. 3)

Attachment B to the warrant application is an Informant's Attachment. On Attachment B, Deputy Krohn recited the following information:

> A Peace Officer - specifically ROGER K. KROHN - received information from the following persons who are reliable for the following reasons:
>
> A. Informant DEPUTY MIKE BREMSER is reliable and/or the information provided by him/her is believable because:
>
> _X_ The informant is a police officer.
>
> _X_ The informant is a concerned citizen with no reason to fabricate the information.
>
> _X_ The information provided has been corroborated, specifically, THE DESCRIPTION OF THE ITEMS AND PROPERTY IN QUESTION ARE [sic] CONSISTENT WITH THE PRESENCE AND PRODUCTION OF A CLANDESTINE LABORATORY. I AM A STATE CERTIFIED CLANDESTINE LABORATORY INVESTIGATOR AND THE DESCRIPTION IS CONSISTENT WITH THE KNOWN METHODS OF PRODUCING ILLEGAL SUBSTANCES.

(Gov't Ex. 1, p. 4) Deputy Krohn testified he checked the first statement above referring to Deputy Bremser. The "concerned citizen" was intended to indicate the UPS driver.

Attachment C to the warrant application is a list of items and property to be seized. (Gov't Ex. 1, p. 7) Attachment D is the County Assessor's property card, described above, and a photograph of a house. (Gov't Ex. 1, pp. 9-10)

At the first hearing, Deputy Krohn testified that when he presented the application to Magistrate Taylor, he also presented all of the documents contained in Gov't Exs. 2 and

4; however, those documents were not filed with the application, warrant, and return. He stated it had been his intent to keep the informant's identity confidential.

The deputy testified Spencer was apprehended by State Patrol officers outside his residence, and Spencer was present when officers executed the search warrant. He stated initial entry was made by a State Patrol Swat Team and agents of the Iowa DNE, and Deputy Krohn also was at the scene. Deputy Krohn stated he generally leaves a copy of only the first page of the warrant (Gov't Ex. 1, p. 2, in this case) with the owner of the premises being searched, and he left a copy of that page with Spencer at the time of the search. Deputy Krohn did not know if the State Patrol or DNE officers gave Spencer any other documentation pertaining to the search warrant.

Magistrate Taylor testified the warrant application was presented to him by Deputy Krohn. At the time the magistrate saw the application, it had already been signed by Deputy Krohn and by an Assistant Monona County Attorney.[4] (*See* Gov't Ex. 1, p. 1) Magistrate Taylor stated that when the application is presented to him, none of the documents are stapled together; they are all loose sheets. He reviews all the documents presented to him, determines whether probable cause exists, and if he finds probable cause, he signs the warrant. He has no knowledge of how the officers package the application and warrant after they leave his hands, nor does he know what documentation is left with the subject of the search at the time the search is conducted.

Magistrate Taylor confirmed that he had reviewed the contents of Gov't Exs. 2 and 4 at the time of the warrant application. He further testified he had relied on the

[4]The record is silent as to whether Magistrate Taylor placed Deputy Krohn under oath to confirm his averments in the affidavit. However, in light of the Eighth Circuit's recent holding in *United States v. Hessman*, 369 F.3d 1016 (8th Cir. 2004), it would appear that an unsworn affidavit would not invalidate the warrant by virtue of the *Leon* "good faith" exception. *See id.*, 369 F.3d at 1019-23 (discussing *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)).

information in those documents in making the probable cause determination, despite the fact that he made no notation regarding them on his endorsement to the warrant.

Magistrate Taylor also stated he was aware of legal uses for methanol, noting he had used the chemical himself in hobbying activities. He also was aware that "free basing" has to do with a type of drug use, and not a drug manufacturing process.

At the second hearing, further testimony was elicited regarding the events that occurred on June 15-16, 2000, in connection with issuance and execution of the search warrant. The warrant was signed by Magistrate Taylor on June 15, 2000. At approximately 6:00 a.m. on June 16th, officers from the Iowa State Patrol, Iowa DNE, and Monona County Sheriff's office met in Mapleton, Iowa, for a briefing regarding the planned execution of the search warrant. During the briefing, the officers learned the State Patrol already had two pre-raid surveillance teams at Spencer's residence. They had made contact with Spencer in his garden, and had taken him into custody to secure the scene. The other officers quickly concluded the briefing and proceeded to Spencer's residence.

Trooper Tews testified the State Patrol's Tactical Entry Team, of which he was a member, was first on the scene. They entered the property and checked Spencer's residence to ensure no other persons were present. After they cleared the residence, they turned the search over to the DNE officers who conducted the actual search. Agent Leighter was part of the search team, and he completed the inventory of the items seized during the search. The inventory is completed on a four-part carbonless form that makes duplicates of the inventory. He testified his standard procedure is to tear off one copy of the inventory to be left at the scene along with a copy of the warrant, and he gives one copy to the warrant affiant (Deputy Krohn, in this case).

Agent Jones was part of the team that went to Spencer's residence to execute the search warrant. Agent Jones carried with him a copy of the first page of the search

warrant, which he read to Spencer verbatim as soon as the officer reached the scene. Agent Jones testified he recalled the warrant having more than one page, but he did not recall any of the attached documents.

Deputy Krohn was recalled to testify at the second hearing. In his testimony, the deputy stated he arrived at the scene when the original entry was made into Spencer's residence. At all times, both during the pre-operation briefing and during the search at the scene, he had with him a complete copy of the warrant application and the warrant, including Attachment D and all of the other documentation that was presented to Magistrate Taylor at the time he signed the warrant. Deputy Krohn stated the only document he did not have with him was the warrant return, which was completed after the search. He stated the standard practice is to leave a copy of the first page of the search warrant, and a copy of the list of seized items, with the owner of the searched premises.

IV. ANALYSIS

In his motion, Spencer argues Deputy Krohn, as the warrant affiant, "intentionally or with reckless disregard for the truth failed to disclose material information [in] the application for the search warrant." (Doc. No. 33, ¶ 10) Specifically, Spencer argues Deputy Krohn should have informed Magistrate Taylor that the informant (the UPS driver) "had no training or experience in detecting clandestine drug labs," and that there "were innocent explanations for [Spencer's] methanol purchase." (*Id.*, ¶ 11)

The first issue before the court is whether Spencer has made the requisite showing for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Under *Franks*, the court is required to hold a hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit,

and if the allegedly false statement is necessary to the finding of probable cause[.]" 438 U.S. at 155-56, 98 S. Ct. at 2676. Further,

> [i]n the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 156, 98 S. Ct. at 2676. The same principles are true for material the defendant alleges was omitted from (rather than included in) a warrant affidavit.

Under *Franks*, before a defendant is entitled to a hearing, he must make a *substantial* preliminary showing that relevant information was omitted from the affidavit either intentionally or with reckless disregard for the truth. The substantiality requirement is not easily met. *See United States v. Hiveley*, 61 F.3d 1358, 1360 (8th Cir. 1995); *United States v. Wajda*, 810 F.2d 754, 759 (8th Cir. 1987). When no proof is offered that an affiant deliberately lied or recklessly disregarded the truth, a *Franks* hearing is not required. *U.S. v. Moore*, 129 F.3d 989, 992 (8th Cir. 1997). "A mere allegation standing alone, without an offer of proof in the form of a sworn affidavit of a witness or some other reliable corroboration, is insufficient to make the difficult preliminary showing." *Id.* (citing *Franks*, 438 U.S. at 171); *see United States v. Ketzeback*, 358 F.3d 987 (8th Cir. 2004);[5] *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986). The defendant also

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[5] In *Ketzeback*, the court held:

> A facially valid warrant affidavit is constitutionally infirm if the defendant establishes the affidavit included deliberate or reckless falsehoods that, when redacted, render the affidavit's factual allegations insufficient to support a finding of probable cause. *Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Omissions likewise can

(continued…)

must show "that the allegedly false statement was necessary to a finding of probable cause or that the alleged omission would have made it impossible to find probable cause." *United States v. Mathison*, 157 F.3d 541, 548 (8th Cir. 1998).

Spencer has failed to make the required "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676. Although the warrant application, in particular the informant's attachment, was drafted somewhat inartfully, the court finds any omission was unintentional and did not prevent Magistrate Taylor from understanding what information was provided by whom. Further, even if the respective knowledge of the two informants (the officer and the UPS driver) had been more clearly stated, the facts still would not have "made it impossible to find probable cause." *Mathison*, 157 F.3d at 548. The UPS driver's written statement and the invoices for the sale of chemicals and lab equipment to Spencer provided ample probable cause for issuance of the warrant. *See Illinois v. Gates*, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317 & n.10, 2331, 76 L. Ed. 2d 527 (1983) (setting out standards for warrant affidavit). Because Spencer has failed to show a *Franks* hearing is warranted, his request for a hearing should be **denied**.[6]

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[5](…continued)

> vitiate a warrant if the defendant proves "first that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and, second, that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.'" *United States v. Allen,* 297 F.3d 790, 795 (8th Cir. 2002).

Ketzeback, 358 F.3d at 990.

[6]Nevertheless, the court held a full hearing to assist the district court in rendering a timely ruling on Spencer's motion.

The second issue is whether, in the absence of the address to be searched on its face, the warrant passed constitutional muster under *Groh*. In addition, Spencer argues that because he was not provided with a complete copy of the warrant, and the first page that was given to him did not identify the premises to be searched, his Fourth Amendment rights were violated and the evidence flowing from the search should be suppressed. A more detailed look at *Groh* will facilitate consideration of Spencer's arguments.

Groh involved the search of a Montana ranch by ATF agents, who were looking for illegal firearms and destructive devices. On the basis of an informant's tip, ATF Agent Groh prepared a thorough warrant application that identified the place to be searched and all the types of contraband officers wanted to seize. The warrant itself, however, did not incorporate by reference the itemized list of contraband that was included in the warrant application. The warrant identified the "person or property to be searched" as a "single dwelling residence two story in height which is blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction." *Groh*, 124 S. Ct. at 1288.

When officers went to the ranch to execute the warrant, Agent Groh orally described the objects of the search to the rancher's wife, who was present at the scene, and by telephone to the rancher.[7] The search yielded no illegal weapons or other contraband. When the search was concluded, Agent Groh gave the rancher's wife a copy of the warrant itself, but not the application which contained a list of the contraband to be seized.

The rancher sued Agent Groh and other officers who had conducted the search alleging, *inter alia*, that their rights under the Fourth Amendment had been violated. The

[7]The parties in *Groh* disagreed as to what Agent Groh said to the rancher and his wife, but this factual dispute is not relevant to the present inquiry. Similarly, the court has omitted facts and discussion relating to other claims in *Groh*, such as the officers' qualified immunity from personal suit, because those matters are not relevant here.

district court found no violation of the Fourth Amendment "because it considered the case comparable to one in which the warrant contained an inaccurate address, and in such a case, the court reasoned, the warrant is sufficiently detailed if the executing officers can locate the correct house." *Groh*, 124 S. Ct. at 1289. The Ninth Circuit Court of Appeals reversed on the Fourth Amendment issue, holding the warrant was invalid because it failed to describe the place to be searched and items to be seized with particularity, and Agent Groh's oral statements to the rancher and his wife did not cure the omission. *Id.* (discussing *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1029-30 (9th Cir. 2002)). The Ninth Circuit noted that "'[t]he leaders of the search team must also make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search, *and that such copy has no missing pages or other obvious defects*.'" *Id.* (quoting *Ramirez*, 298 F.3d at 1027) (emphasis added).

The Supreme Court held, "The warrant was plainly invalid[,]" because it "failed altogether" to describe with particularity the persons or things to be seized. *Groh*, 124 S. Ct. at 1289. Further, the Court held as follows:

> The fact that the *application* adequately described the "things to be seized" does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. *See Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) ("[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional"); *see also United States v. Stefonek*, 179 F.3d 1030, 1033 ([7th Cir.] 1999) ("The Fourth Amendment requires that the *warrant* particularly describe the things to be seized, not the papers presented to the judicial officer . . . asked to issue the warrant"). And for good reason: "The presence of a search warrant serves a high function," *McDonald v. United States*, 335 U.S. 451, 455, 69

> S. Ct. 191, 93 L. Ed. 153 (1948), and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit **if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.** *See, e.g., United States v. McGrew*, 122 F.3d 847, 849-50 ([9th Cir.] 1997); *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 ([10th Cir.] 1993); *United States v. Blakeney*, 942 F.2d 1001, 1025-1026 ([6th Cir.] 1991); *United States v. Maxwell*, 920 F.2d 1028, 1031 ([D.C. Cir.] 1990); *United States v. Curry*, 911 F.2d 72, 76-77 ([8th Cir.] 1990); *United States v. Roche*, 614 F.2d 6, 8 ([1st Cit.] 1980).

Groh, 124 S. Ct. at 1289-90) (italicized emphasis by the Court; bold emphasis added).

In *Groh*, the warrant failed to incorporate other documents by reference, and neither the affidavit nor the warrant application accompanied the warrant. The Court noted that "unless the particular items described in the affidavit are also set forth in the warrant itself (***or at least incorporated by reference, and the affidavit present at the search***), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Groh*, 124 S. Ct. at 1291 (emphasis added; citing *McDonald v. United States*, 335 U.S. at 455, 69 S. Ct. at 193).

Because of the absence of relevant facts in *Groh*, the Supreme Court did not discuss in detail its observation that a warrant may pass constitutional scrutiny if it incorporates another document by reference and the referenced document is present at the scene during

the search. The Eighth Circuit, however, has considered the issue and reached the same result as that stated in *dicta* in *Groh*:

> "The traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant. . . . However, where the affidavit is incorporated into the warrant, it has been held that the warrant may properly be construed with reference to the affidavit for purposes of sustaining the particularity of the premises to be searched . . ., provided that a) the affidavit accompanies the warrant, and b) the warrant uses suitable words of reference which incorporate the affidavit therein."

United States v. Strand, 761 F.2d 449, 453 (8th Cir. 1985) (quoting *United States v. Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1976)).

Applying *Groh* and *Strand* to the facts in the present case, the warrant prepared by Deputy Krohn incorporated, by reference, Attachment D, which contained the address of the property to be searched and showed Spencer as the occupant of the property since June 19, 1989. The warrant and the warrant application, including all of the documents that were shown to Magistrate Taylor at the time he issued the warrant, were present at the scene throughout the search of Spencer's property. Had Spencer asked to see the documents supporting the warrant, the documents were present and available for him to review. The court therefore finds Spencer's Fourth Amendment rights were not violated by the deputy's failure to state the property address on the face of the warrant. The warrant's incorporation of Attachment D, and the attachment's presence at the scene throughout the search, satisfied the Fourth Amendment's particularity requirement.

Spencer argues further that his rights were violated because he was not shown the entire warrant, including Attachment D, at the time of the search. In support of his

argument, Spencer cites *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), where the Ninth Circuit held the defendant's rights were violated when officers failed to present her with a complete copy of the warrant at the outset of a search of her apartment. *Id.*, 194 F.3d at 990. Gantt had asked to see the complete warrant, but the agents failed to show it to her until several hours later. The *Gantt* court held, "absent exigent circumstances, if a person is present at the search of her premises, [Federal Rule of Criminal Procedure] 41(d) requires officers to give her a complete copy of the warrant at the outset of the search." *Id.*, 194 F.3d at 994.

The *Gantt* court noted its "sister circuits have also recognized that the failure to serve the warrant on the subject of the search prior to the search is a violation of Rule 41(d). . . ," citing cases from the First, Fifth, Sixth, and Seventh Circuits. *Id.*, 194 F.3d at 993. However, the *Gantt* court further noted its sister circuits had "declined to mandate suppression" despite the violation of Rule 41(d). *Id.*. The *Gantt* court observed, "Violations of Rule 41(d) do not usually demand suppression . . . [unless] there was a 'deliberate disregard of the rule' or if the defendant was prejudiced." *Id.*, 194 F.3d at 994 (citing *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1283 (9th Cir. 1992)). In *Gantt*, the court found suppression was warranted "because the violation was deliberate." *Id.*

Spencer has not directed the court's attention to any Eighth Circuit cases holding Rule 41(d) is violated when officers fail to serve a complete copy of the warrant on the subject of a search prior to the search, and the court has not located Eighth Circuit authority directly on point. However, even assuming *arguendo* that the Eighth Circuit would reach a similar result and find a Rule 41(d) violation occurred, suppression still may not be warranted based on the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)).

Leon stands for the proposition that even when a warrant is invalid, if officers reasonably and in good faith relied on the search warrant, then evidence obtained from the search should not be suppressed. "[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.*, 468 U.S. at 918, 104 S. Ct. at 3418.

Notably, "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). Thus, if serious deficiencies exist either in the warrant application itself, or in the magistrate's probable cause determination, then the *Leon* good faith exception may not apply. The Court noted that good faith on law enforcement's part in executing a warrant "is not enough," because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

The relevant question is whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and

reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

The Eighth Circuit has recognized that the *Leon* exception may be applicable even in a case where a warrant is found invalid for insufficient particularity, such as a failure to particularize the place to be searched or the items to be seized. *See United States v. Curry*, 911 F.2d 72 (8th Cir. 1990). The court finds this is such a case. There is no evidence that Deputy Krohn acted in bad faith in applying for the search warrant, or that the officers present at the search acted intentionally, willfully, or negligently to deprive Spencer of his right to see the complete warrant. An officer very deliberately sought out Spencer and read him the first page of the warrant, verbatim, at the beginning of the search. Deputy Krohn had a complete copy of the warrant with him throughout the search. There is no indication Spencer ever asked to see the complete warrant, or expressed any

doubt that the officers had the authority to search his property. The State Troopers, DNE agents, and local law enforcement officers had seen copies of the complete warrant and had been briefed fully by Deputy Krohn and others prior to approaching the property.

The court finds suppression of the evidence in this case would not further the purposes of the exclusionary rule. Spencer has offered no evidence that the officers executing the search, including the warrant affiant Deputy Krohn, acted in bad faith, or reasonably should have known it was a violation of Spencer's rights not to show him a complete copy of the warrant.

For these reasons, the court finds Spencer's motion to suppress should be denied.

V. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED** that Spencer's motion to suppress be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections by **August 17, 2004**. Any response to the objections must be served and filed by **August 20, 2004.**

If either party objects to this report and recommendation, that party must immediately order a transcript of all portions of the record the district court judge will need to rule on the objections.

IT IS SO ORDERED.

DATED this 11th day of August, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT